U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-G-I-&S-

DATE: OCT. 19, 2018

APPEAL OF TEXAS SERVICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a hotel operator, seeks to employ the Beneficiary as an accountant. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a position requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Texas Service Center denied the petition. Finding that the Petitioner and the Beneficiary willfully concealed the Beneficiary's ownership interest in the business, the Director invalidated the accompanying certification from the U.S. Department of Labor (DOL). The Director also concluded that the Petitioner did not establish the Beneficiary's possession of the minimum employment experience and education required for the offered position.

On appeal, the Petitioner asserts that the Director erred in denying the petition without first providing it with documentary evidence supporting his findings.

We cannot immediately assess the Petitioner's claims, however. Our *de novo* review reveals a more fundamental issue that must be resolved: the apparent expiration of the labor certification before the petition's filing. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, a prospective employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204

of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. EXPIRATION OF A LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced-degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification expires if not filed with USCIS in support of an immigrant petition within 180 days of the certification's grant. 20 C.F.R. § 656.30(b)(1).

> USCIS will reject Form I-140 petitions that require an approved labor certification if the labor certification has expired, or if the Form I-140 is filed without the approved labor certification. USCIS will deny a petition that was inadvertently accepted without a required, valid labor certification.

Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Ops., USCIS, HQ 76/6.2 AD 07-26, *Revisions to Adjudicator's Field Manual (AFM). Chapter 22.2(b) General Form I-140 Issues (AFM Update AD07-26)*, 3 (Sept. 14, 2009), https://www.uscis.gov/sites/default/files/USCIS/New%20Structure/Laws%20and%20Regulations/Memoranda/%2A2009%20Memos%20By%20Month/Sep%202009/AFM%20AD07-26%20Signed.pdf (last visited Oct. 3, 2018).

Here, the accompanying labor certification indicates its grant on December 4, 2009. Thus, under 20 C.F.R. § 656.30(b)(1), the labor certification remains unexpired if the Petitioner filed it with a petition by June 2, 2010. USCIS records indicate that the Petitioner did not file the labor certification with a petition until February 14, 2011.[1] The labor certification therefore appears to have expired.

In prior proceedings, the Petitioner asserted its timely filing of a petition containing the labor certification. But the Petitioner did not document a qualifying filing. Thus, the record does not establish the unexpired nature of the labor certification and indicates USCIS' inadvertent acceptance of this petition.

The Director did not address the apparent expiration of the labor certification. We will therefore remand this matter. On remand, the Director should ask the Petitioner to document that, by June 2, 2010, it filed a petition containing the labor certification. The Director should afford the company a reasonable opportunity to respond. Upon a timely response, the Director should review the entire record and issue a new decision.

[1] USCIS records identify the Petitioner's earliest submitted petition by the receipt number [redacted]

III. CONCLUSION

The record indicates that the accompanying labor certification expired before the petition's filing. If the Petitioner does not establish its timely filing of the labor certification with a prior petition, USCIS policy requires the Director to deny this petition based on the certification's expiration.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of C-G-I-&S-*, ID# 1772531 (AAO Oct. 19, 2018)